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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JEFFREY SPESOCK, et al.,

11 Plaintiffs,

12 v.

13 U.S. BANK, N.A., et al.,

14 Defendants.

CASE NO. C18-0092JLR

ORDER DENYING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

15 **I. INTRODUCTION**

16 Before the court are the parties' cross motions for summary judgment:

17 (1) Plaintiffs Jeffrey Spesock and Janet Spesock's ("the Spesocks") motion for summary
18 judgment (Plf. MSJ (Dkt. # 18)); and (2) Defendant U.S. Bank N.A., successor trustee to
19 Bank of America N.A., successor in interest to LaSalle Bank N.A., as trustee for
20 Washington Mutual Mortgage Pass-Through Certificate WMALT Series 2006-AR4
21 Trust's ("the Trust") cross motion for summary judgment (Def. MSJ (Dkt. # 21)). The
22 court has considered the motions, all submissions filed in support of and opposition to the

1 motions, the applicable law, and the relevant portions of the record. Being fully advised,¹
2 the court DENIES the Spesocks' motion and GRANTS the Trust's motion.

3 II. BACKGROUND

4 On or about February 27, 2006, Mr. Spesock executed a promissory note in the
5 original sum of \$840,000.00 ("the Note"). (Hoisington Decl. (Dkt. # 22) ¶ 2, Ex. A; *see*
6 4/6/18 Spesock Decl. (Dkt. # 19) ¶ 3.²) The Note was secured by a deed of trust
7 encumbering real property commonly known as 1301 Mukilteo Lane, Mukilteo,
8 Washington 98275, located in Snohomish County, Washington ("the Property") and
9 signed by the Spesocks ("the Deed of Trust"). (Hoisington Decl ¶ 3, Ex. B; 4/6/18
10 Spesock Decl. ¶ 3.) The Note was endorsed by the original lender, Fremont Investment
11 & Loan, to Residential Funding Corporation, which in turn executed an allonge endorsing
12 the Note in blank. (Hoisington Decl. ¶ 2, Ex. A.) The Trust now holds the
13 endorsed-in-blank Note. (*See id.*; *see also* Def. MSJ at 2.)

14 In July 2008, the Spesocks defaulted on the Note and Deed of Trust by failing to
15 make payments on the Note as they came due. (Hoisington Decl. ¶ 5.) The Spesocks
16 filed for bankruptcy on March 18, 2009. (4/6/18 Spesock Decl. ¶ 4.) On October 15,
17 2009, the bankruptcy court granted the Spesocks a Chapter 7 discharge that allegedly
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19 ¹ No party asked for oral argument on either motion (*see* Plf. MSJ at 1; Def. MSJ at 1),
20 and the court determines that oral argument would not assist its disposition of the motions, *see*
Local Rules W.D. Wash. LCR 7(b)(4).

21 ² Paragraph 3 of Mr. Spesock's April 6, 2018, declaration is unnumbered, but follows
22 numbered paragraph two, precedes numbered paragraph four, and appears on page three of the
declaration. (*See* 4/6/18 Spesock Decl. at 3.)

1 covers the Note at issue here.³ (*See id.* ¶ 4, Ex. E.) The Spesocks admit that even if their
2 personal liability to pay on the Note was discharged in bankruptcy, the Trust can still
3 validly enforce the Note “*in rem*” by foreclosing under the Deed of Trust related to the
4 Property. (*See* Plf. MSJ at 6 (“The discharge . . . did not affect the Defendants’ right to
5 enforce the Deed of Trust in-rem [sic].”))

6 JPMorgan Chase Bank (“Chase”) was the servicer of the Spesocks’ Note after
7 their bankruptcy. (Hoisington Decl. ¶ 5.) Chase made numerous attempts to foreclose on
8 the Property after the October 15, 2009, bankruptcy discharge. (*Id.* ¶¶ 8-15.) Chase set
9 dates for four different foreclosure sales of the Property, including January 4, 2010,
10 February 5, 2010, March 19, 2010, and April 30, 2010. (*Id.* ¶¶ 8-11, Exs. E-H; Praecipe
11 (Dkt. # 26) (attaching corrected copy of Ex. H).)

12 Between April 30, 2010 and February 3, 2011, Chase worked with the Spesocks to
13 gather documents and information to see if they qualified for a loan modification that
14 would allow them to keep the Property. (Hoisington Decl. ¶ 12.) By a letter dated
15 February 10, 2011, Chase ultimately denied the Spesocks’ request for a loan
16 modification. (*Id.* ¶ 12, Ex. I.) The Spesocks appealed Chase’s denial of a loan
17 modification. (*Id.* ¶ 12.) Chase completed a second level of review and confirmed again
18 that the Spesocks were ineligible for a permanent loan modification. (*Id.* ¶ 12, Ex. J.)

19 Chase began the foreclosure process again in 2012, by sending the Spesocks both
20 a notice of pre-foreclosure options dated February 16, 2012, and a notice of intent to

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22 ³ The Trust concedes that the Note was properly discharged in bankruptcy for purposes of
the court’s consideration of summary judgment only. (Def. MSJ at 3 n.3.)

1 foreclose dated March 13, 2012. (*Id.* ¶¶ 13-14, Exs. K, L.) In response, the Spesocks
2 requested another loan modification during this period, which Chase again denied on July
3 9, 2012, after two-levels of review. (*Id.* ¶ 15, Ex. M.)

4 Select Portfolio Servicing, Inc. (“SPS”) replaced Chase as the servicer of the Note
5 in August 2013. (*Id.* ¶ 16.) On October 1, 2013, SPS sent a notice of default to the
6 Spesocks. (*Id.* ¶ 16, Ex. N.) The notice of default indicated a willingness to work with
7 the Spesocks to avoid foreclosure but explained that foreclosure could happen, “[e]ven
8 though your personal liability on the [N]ote is discharged” through bankruptcy. (*Id.* at 1.)
9 SPS warned that “[t]he owner of the mortgage, as lien holder, continues to have an
10 enforceable lien on the real property,” while at the same time explaining that “SPS is
11 committed to home retention and offers many customer assistance programs designed to
12 help customers avoid foreclosure.” (*Id.*) SPS went onto state that “[i]f [it] does not
13 receive the [a]mount [r]equired to [c]ure by the [c]ure [d]ate, or if some loss mitigation
14 alternative to foreclosure has not started, SPS may initiate foreclosure” but that if an
15 agreement is reached before that time, “we will not proceed with and/or commence
16 foreclosure, as long as you comply with the agreement and make required payments.”
17 (*Id.* at 2.) On June 13, 2014, SPS sent a Notice of Pre-Foreclosure Options to the
18 Spesocks, warning that it would issue a Notice of Default if the Spesocks did not respond
19 within 30 days, as required by the Washington Deed of Trust Act. (*Id.* ¶ 17, Ex. O.) On
20 September 21, 2014, in response to SPS’s October 1, 2013, and June 13, 2014, notices,
21 the Spesocks applied for hardship loan assistance. (*Id.* ¶ 18.) The Trust, however,
22 ultimately proceeded with attempting to foreclose on the Property. (*Id.*)

1 Between December 2014 and December 2016, SPS sent notice of and scheduled
2 five separate foreclosure sales on April 17, 2015, January 8, 2016, September 30, 2016,
3 January 6, 2017, and April 28, 2017. (*Id.* ¶¶ 20-24, Exs. Q-U.) On April 21, 2017, the
4 Spesocks applied for a trial loan modification, which halted the foreclosure sale
5 scheduled for April 28, 2017. (*Id.* ¶ 25.) The Spesocks did not comply with the trial
6 modification payment plan, and it expired on July 2, 2017. (*Id.*)

7 On July 17, 2017, SPS issued a Notice of Trustee's Sale scheduling a foreclosure
8 sale of the Property on November 17, 2017. (*Id.* ¶ 26, Ex. V.) On November 8, 2017, the
9 Spesocks sent a letter to SPS appealing the decision to deny a loan modification and
10 proceed with foreclosure. (*Id.* ¶ 27, Ex. W.) In response, SPS again cancelled the
11 foreclosure sale and stated an intent to reopen the loan modification process. (*Id.* ¶ 27,
12 Ex. X.)

13 The Spesocks, however, filed a complaint against Northwest Trustee Services, Inc.
14 ("NWTS") in Snohomish County Superior Court alleging that the Trust had slept on its
15 rights and that the statute of limitations for foreclosing on the Property had expired. (*Id.*
16 ¶ 28.) On November 17, 2017, the state court issued a temporary restraining order
17 ("TRO") on an *ex parte* basis against NWTS enjoining any foreclosure sale. (*Id.* ¶ 28,
18 Ex. Y.) The only entity against whom the state court issued the TRO was NWTS. (*Id.*)

19 On December 6, 2017, the Spesocks filed a separate suit in Snohomish County
20 Superior Court against the Trust, seeking to quiet title to the property. (*See* Compl. (Dkt.
21 # 1-1).) On January 22, 2018, the Trust removed the action to federal court. (*See* Not. of
22 Removal (Dkt. # 1).) On July 7, 2018, the Spesocks moved for summary judgment

1 arguing, as they did in state court, that the statute of limitations for enforcing the Deed of
2 Trust has expired. (*See* Plf. MSJ.) The Trust responded and cross moved for summary
3 judgment dismissing all the Spesocks’ claims. (*See* Def. MSJ.) The court now considers
4 the parties’ motions.

5 **III. ANALYSIS**

6 The Spesocks assert one claim in their complaint—namely, that they are entitled
7 to quiet title to the Property in their names. (*See generally* Compl.) In their motion for
8 summary judgment, they argue that the statute of limitations for the Trust to enforce the
9 Deed of Trust has expired. (*See* Plf. MSJ; *see also* Compl. ¶¶ 2.7-2.11.) The Trust
10 responds that not only are the Spesocks not entitled to summary judgment on the statute
11 of limitations issue, but the Trust is entitled to summary judgment on this issue instead.
12 (*See* Def. MSJ at 6-11.)

13 In addition, the Spesocks also allege that they are entitled to quiet title on the
14 Property because the beneficial interest in the Note somehow has been improperly
15 assigned. (*See* Compl. ¶¶ 2.2-2.6.) The Trust moves for summary judgment on this
16 issue, as well. (Def. MSJ at 12-14.) The Spesocks fail to respond. (*See generally* Plf.
17 Resp. (Dkt. # 23).) The court now addresses both the statute of limitations and the
18 assignment issue.

19 **A. Standard**

20 Summary judgment is proper where, viewing the evidence and inferences
21 therefrom in favor of the nonmoving party, “the movant shows that there is no genuine
22 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

1 Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).
2 Material facts are those that may affect the outcome of the suit under governing law, and
3 an issue of material fact is genuine “if the evidence is such that a reasonable jury could
4 return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. “[W]hen
5 simultaneous cross-motions for summary judgment on the same claim are before the
6 court, the court must consider the appropriate evidentiary material identified and
7 submitted in support of both motions, and in opposition to both motions, before ruling on
8 each of them.” *Tulalip Tribes of Wash. v. Washington*, 783 F.3d 1151, 1156 (9th Cir.
9 2015) (quoting *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d
10 1132, 1134 (9th Cir. 2001)). The court “rule[s] on each party’s motion on an individual
11 and separate basis, determining, for each side, whether a judgment may be entered in
12 accordance with the Rule 56 standard.” *Id.* (internal quotation marks omitted) (quoting
13 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and*
14 *Procedure* § 2720 (3d ed. 1998)).

15 **B. Statute of Limitations**

16 1. Tolling During Foreclosure Proceedings

17 “When an action for foreclosure on a deed of trust is barred by the statute of
18 limitations, RCW 7.28.300 authorizes an action to quiet title.” *Westar Funding, Inc. v.*
19 *Sorrels*, 239 P.3d 1109, 1113 (Wash. Ct. App. 2010), *as amended on denial of*
20 *reconsideration* (Nov. 9, 2010). Specifically, RCW 7.28.300 states:

21 The record owner of real estate may maintain an action to quiet title against
22 the lien of a mortgage or deed of trust on the real estate where an action to
foreclose such mortgage or deed of trust would be barred by the statute of

1 limitations, and, upon proof sufficient to satisfy the court, may have
2 judgment quieting title against such a lien.

3 *Id.* The Washington statute of limitation governing actions on written contracts, like the
4 Deed of Trust at issue here, is six years. *See* RCW 4.16.040. “The statute of limitation
5 does not begin to run until a breach of the contract occurs.” *Safeco Ins. Co. v. Barcom*,
6 773 P.2d 56, 60 (Wash. 1989).

7 Ordinarily, the statute of limitations on an installment note, like the Note, “runs
8 against each installment from the time it becomes due; that is, from the time when an
9 action might be brought to recover it.” *Edmundson v. Bank of Am.*, 378 P.3d 272, 277
10 (Wash. 2016) (quoting *Herzog v. Herzog*, 161 P.2d 142, 144-45 (Wash. 1945)). A
11 separate cause of action arises on each installment, and the statute of limitations runs
12 separately against each such installment. *Silvers v. U.S. Bank Nat’l Ass’n*, No.
13 C15-548RJB, 2015 WL 5024173, at *4 (W.D. Wash. Aug. 25, 2015). When a note is
14 discharged in a Chapter 7 bankruptcy, the statute of limitations to enforce the
15 corresponding deed of trust runs from the date the last payment on the note was due prior
16 to the Chapter 7 discharge.⁴ *Id.*

17 The Spesocks received a Chapter 7 discharge on October 15, 2009, which included
18 the Note. (4/6/18 Spesock Decl. ¶ 4, Exs. D, E.) Thus, they argue that they are entitled

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20 ⁴ As the Spesocks admit (*see* Plf. MSJ at 6), the fact that the Note was discharged in
21 bankruptcy did not affect the Trust’s ability to foreclose on the Property under the Deed of Trust,
22 *see Creagan v. Nationstar Mortg. LLC*, No. C17-5138 RBL, 2018 WL 4095091, at *2 (W.D.
Wash. Aug. 28, 2018) (“Nothing in the Deeds of Trust Act supports the conclusion that the lien
of a deed of trust on real property is discharged under state law when the note or other secured
obligation is no longer enforceable.”).

1 to summary judgment quieting title to the Property in their names because the Trust did
2 not commence any proceeding to foreclose on the Deed of Trust “within six years of the
3 last due payment or of the [Chapter 7] discharge.” (Plf. MSJ at 8.)

4 The Trust responds that the Spesocks’ assertion that “[n]o proceeding to
5 commence foreclosure” was initiated during the statutory period (*id.*) is factually
6 incorrect (*see* Def. MSJ at 6-7). Although the Trust did not complete foreclosure
7 proceedings prior to the Spesocks’ present suit, it initiated numerous such proceedings.
8 Indeed, as detailed above, the servicer of the Note set at least 10 different dates for a
9 foreclosure sale of the Property under the Deed of Trust between 2009 and 2017. *See*
10 *supra* § II.

11 The Trust further responds that, although the statute of limitations on a Deed of
12 Trust begins to run when the underlying Note is discharged in bankruptcy,⁵ Washington
13 courts recognize that the commencement of non-judicial foreclosure proceedings tolls the
14 running of the statutory period. *Bingham v. Lechner*, 45 P.3d 562, 568 (Wash. Ct. App.
15 2002) (stating that a party’s “filing of [non-judicial] foreclosure proceedings . . . tolled
16 the statute of limitations”). Indeed, in their response, the Spesocks acknowledge that
17 “[t]he statute of limitations is tolled by the issuance of [a] Notice of Trustee’s Sale.” (*See*
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19 ⁵ The Trust asserts that the statute of limitations began to run on the date of the Spesocks’
20 bankruptcy discharge, which is October 15, 2009. (*See* Def. MSJ at 7.) The Spesocks, however,
21 assert that the statutory period began to run from the date that the last payment on the Note was
22 due prior to their Chapter 7 discharge, which was on October 1, 2009. (*See* Plf. Resp. (Dkt.
23) at 1.) This 14-day discrepancy, however, is immaterial for purposes of the court’s
consideration of the parties’ summary judgment motions on this issue. Accordingly, the court
does not decide this issue.

1 Plf. Resp. at 2.) Washington courts similarly recognize that multiple incomplete, non-
2 judicial foreclosure proceedings may be counted together to toll the limitations period.
3 *See Erickson v. Am.'s Wholesale Lender*, No. 77742-4-I, 2018 WL 1792382, at *4
4 (Wash. Ct. App. Apr. 16, 2018) (combining four notices of trustee's sales to toll the
5 statutory period for a total of over six years); *Fujita v. Quality Loan Serv. Corp. of Wash.*,
6 No. C16-925-TSZ, 2016 WL 4430464, at *2 (W.D. Wash. Aug. 22, 2016) ("Although the
7 entire debt became due on July 16, 2009, the statute of limitations on [the bank's] ability
8 to foreclose was tolled during the pendency of two Notices of Trustee Sale which were
9 ultimately discontinued.") (citing *Bingham*, 45 P.3d at 566-68).

10 As detailed in Appendix 1 to the Trust's motion, the Trust commenced and
11 terminated ten separate non-judicial foreclosure proceedings since the Spesocks obtained
12 a bankruptcy discharge on October 15, 2009. (Def. MSJ, App'x 1.) Under Washington
13 law, each of these incomplete non-judicial foreclosures separately tolled the statutory
14 period. *See Fujita*, 2016 WL 4430464, at *2. With the tolling associated with these non-
15 judicial foreclosure proceedings properly calculated, the statute of limitations ran for only
16 2,004 days (or 5.49 years) before the Spesocks filed their complaint in this action on
17 December 6, 2017.⁶ Thus, the court concludes that the Trust acted within the limitations
18 period.

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20 ⁶ The Trust calculates that the statute of limitations ran for 1,918 days (or 5.25 years).
21 (See Def. MSJ, App'x 1.) The Trust's calculation, however, includes tolling periods for two
22 notices of pre-foreclosure options, also known as the "initial contact" letter required by RCW
61.24.031(b), which are dated February 16, 2012, and June 13, 2014, respectively. (See *id.* at
16-17.) Case authority supports tolling the limitations period for both a notice of default and a
notice of trustee's sale. *See Fujita*, 2016 WL 4430464, at *2 (tolling the limitations period on

1 2. Notices of Default Tolled the Limitations Period

2 Although the Spesocks acknowledge that a notice of trustee’s sale will toll the
3 running of the statute period, the Spesocks nevertheless argue that a notice of default is
4 not sufficient to toll the statute of limitations. (Plf. Resp. at 2-3 (citing *Fujita*, 2016 WL
5 4430464, at *2 n.4).) They argue that the court should not include time periods related to
6 notices of default in its calculation of the tolling of the statutory period.⁷ (*See id.*)

7 There is a split of authority on this issue. In *Fujita*, a federal district court
8 concluded that a notice of default is insufficient to toll the statute of limitation and that
9 “the proper tolling point is the issuance of the [n]otice of [t]rustee’s [s]ale.” *Fujita*, 2016
10 WL 4430464, at *2 n.4. However, a published Washington Court of Appeals decision
11 ruled that a written notice of default is, in fact, sufficient to trigger tolling of the
12 limitations period under Washington law. *See Edmundson*, 378 P.3d at 277. In
13 *Edmundson*, the court stated that, under RCW 61.24.030(8), a written notice of default “is
14 evidence of resort to the remedies of the Deeds of Trust Act [(“the DTA”)] for the
15 defaults of the [borrower]” *Id.* The DTA does not require the lender to file or
16 record the written notice of default. *See* RCW 61.24.030(8). The *Edmundson* court

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19 the basis of notice of trustee’s sale); *see also Edmundson*, 378 P.3d at 277 (tolling the limitations
20 period on the basis of a written notice of default). Even though an initial contact letter is
21 required by statute, *see* RCW 61.24.031, the Trust did not identify and the court did not locate
any authority for tolling the limitations period on the basis of such a letter or notice. The court
need not decide this issue, however, because even eliminating the tolling that the Trust attributed
to these two notices, the statute of limitations still had not expired by the time the Spesocks filed
their complaint herein.

22 ⁷ Notably, the Spesocks do not dispute that they received all of the notices of default
listed in the Trust’s motion. (*See generally* Plf. Resp.)

1 concluded that such a notice was “all that [wa]s required” to toll the limitations period for
2 the deed of trust at issue. 378 P.3d at 277; *see also Heintz v. U.S. Bank Tr., N.A. for*
3 *LSF9 Master Participation Tr.*, No. 76297-4-I, 2018 WL 418915, at *3 (Wash. Ct. App.
4 Jan. 16, 2018) (unpublished) (“Service of the written notice of default tolls the statute of
5 limitations until 120 days after the date scheduled for nonjudicial foreclosure of the deed
6 of trust.”).⁸

7 The Washington Supreme Court has not ruled on the sufficiency of a notice of
8 default to toll the statute of limitations for enforcing a deed of trust. In the absence of a
9 Supreme Court decision, the Ninth Circuit instructs this court to look to other lower
10 state-court decisions. *Burns v. Int’l Ins. Co.*, 929 F.2d 1422, 1424 (9th Cir. 1991)
11 (“Decisions by the state courts of appeals provide guidance and instruction and are not to
12 be disregarded in the absence of convincing indications that the state supreme court
13 would hold otherwise.”). Accordingly, this court follows *Edmundson* and gives credit to
14 the Trust for tolling the statute of limitations, not only with its various notices of trustee’s
15 sales, but also with the various notices of default that the Trust sent to the Spesocks.⁹
16 (See Def. MSJ, App’x 1.)

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18 ⁸ “[U]npublished opinions of the [Washington] Court of Appeals filed on or after March
19 1, 2013, may be cited as non-binding authorities . . . and may be accorded such persuasive value
as the court deems appropriate.” Wash. G.R. 14.1.

20 ⁹ The Spesocks also argue that a notice of trustee’s sale does not toll the statute of
21 limitations unless the notice is recorded. (Plf. Resp. at 2-3.) Under the DTA, trustees are
22 instructed to record such notices “in each county in which the deed of trust is recorded.” RCW
61.24.040. As the Spesocks point out, there is no evidence that the November 10, 2009, Notice
of Trustee’s Sale was recorded. (See Plf. Resp. at 2; *see Janet Spesock Decl.* ¶ 3, Ex. B; *Jeffrey*
Spesock Decl. ¶ 3, Ex. B; *see generally* Dkt.) The Spesocks provide no authority for their
argument that notices of trustee’s sale must be recorded to toll the statute of limitations on a deed

1 3. Bankruptcy, Not Acceleration, Triggered the Statute of Limitations

2 The Spesocks also argue that the Trust or the servicer of the Note may have
3 accelerated the Note prior to the Spesocks' October 15, 2009, bankruptcy, and that such
4 an acceleration would have commenced the running of the statutory period prior to
5 October 15, 2009. (Plf. Resp. at 2.) "Where an obligation that was to be paid in
6 installments is accelerated, then 'the entire remaining balance becomes due and the
7 statute of limitations is triggered for all installments that had not previously become
8 due.'" *Heintz*, 2018 WL 418915, at *2 (quoting *4518 S. 256th, LLC v. Karen L. Gibbon*,
9 *P.S.*, 382 P.3d 1, 6 (Wash. Ct. App. 2016)).

10 The Spesocks, however, have no direct evidence that the Trust ever accelerated
11 their Note. (*See generally* Plf. Resp.) They cite a March 13, 2012, letter from Chase,
12 which states: "If you fail to cure the default within 35 days . . . , Chase will accelerate the
13 maturity of the Loan, . . . and commence foreclosure proceedings without further notice
14 to you." (Janet Spesock Decl. ¶ 2, Ex. A at 2; Jeffrey Spesock Decl. ¶ 2, Ex. A at 2.)
15 Plaintiffs implicitly argue that such a letter automatically accelerates a loan if the default
16 is not cured. (*See* Plf. Resp. at 2.) The Spesocks further argue that they "may" have

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18 of trust. (*See generally* Plf. Resp.) Further, they do not dispute that they received all of the
19 notices of default and notices of trustee's sales at issue here. (*See generally id.*) The reason that
20 a notice for trustee's sale must be recorded is "to give notice to the world that a foreclosure sale
21 is scheduled for a specific date." *Leahy v. Quality Loan Serv. Corp. of Wash.*, 359 P.3d 805, 808
22 (Wash. Ct. App. 2015), *as amended* (Aug. 24, 2016). Yet, in *Edmundson*, notice to the borrower
alone that the lender intended to resort to DTA remedies "[wa]s all that [wa]s required" to toll
the statutory period. 378 P.3d at 277. The court sees no reason to require proof of recording of a
notice of trustee's sale to toll the statute of limitations when the *Edmundson* court concluded that
mere service of a notice of default on the borrower would suffice to toll the statutory period and
where the Spesocks have not denied receiving the November 10, 2009, Notice of Trustee's Sale
at issue here.

1 received a similar letter prior to their October 15, 2009, bankruptcy, and if so, the
2 statutory period would have begun running earlier than asserted by the Trust. (*See id.*)
3 The Spesocks also point to a notice of trustee’s sale recorded on December 17, 2008—
4 prior to their bankruptcy—to support their argument. (Janet Spesock Decl. ¶ 3, Ex. B;
5 Jeffrey Spesock Decl. ¶ 3, Ex. B; Plf. Resp. at 2.) The Spesocks posit that “[d]iscovery
6 *may* reveal additional correspondence . . . indicating that this [N]ote was accelerated . . .
7 prior to October 1, 2009.” (Plf. Resp. at 2.)

8 Although the Spesocks do not cite to Federal Rule of Civil Procedure 56(d), they
9 appear to be making an argument that the court should either deny the Trust’s motion for
10 summary judgment or defer ruling on it until the parties have an opportunity to conduct
11 further discovery on the issue of acceleration. *See* Fed. R. Civ. P. 56(d); (Plf. Resp. at 2.)
12 When seeking relief under Rule 56(d), “[t]he burden is on the party seeking additional
13 discovery to proffer sufficient facts to show that the evidence sought exists, and that it
14 would prevent summary judgment.” *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091
15 n.5 (9th Cir. 2009) (quoting *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6
16 (9th Cir. 2001)). The Spesocks fail to meet this burden because, as discussed below,
17 even if the facts posited by the Spesocks were true there is no reason for the court to
18 conclude that their Note was accelerated or that the statutory period began running prior
19 to their bankruptcy on October 15, 2009.

20 First, the fact that the Trust may have initiated non-judicial foreclosure
21 proceedings prior to the Spesocks’s bankruptcy does not mean that their Note was
22 accelerated at that time. Washington courts have held that “acceleration does not occur

1 automatically by invoking the power of sale,” and lenders are “not required to accelerate
2 [a] loan in order to pursue a nonjudicial foreclose.” *4518 S. 256th, LLC*, 382 P.3d at 11.
3 Thus, the court cannot conclude on the basis of the pre-bankruptcy notice of trustee’s sale
4 that the Note was accelerated and the statute of limitations commenced running prior to
5 October 15, 2009.

6 Second, the receipt of a letter like the March 13, 2012, letter, in and of itself, does
7 not result in the acceleration of a loan—even if default is not cured. Under Washington
8 law, “acceleration must be made in a clear and unequivocal manner which effectively
9 apprises the maker that the holder has exercised his right to accelerate the payment date.”
10 *Glassmaker v. Ricard*, 593 P.2d 179, 181 (Wash. Ct. App. 1979). In *Erickson v.*
11 *America’s Wholesale Lender*, No. 77742-4-I, 2018 WL 1792382, at *2 (Wash. Ct. App.
12 Apr. 16, 2018), the Washington Court of Appeals concluded that three notices from the
13 lender stating that the loan “will be accelerated” if the borrower did not cure the default
14 did not result in acceleration. *Id.* The court stated that the notices “simply informed [the
15 borrower] of a future contingent event.” *Id.* The Court concluded that the lender could
16 not accelerate the loan without taking some additional affirmative action. *Id.* Likewise,
17 in *Creagan v. Nationstar Mortg. LLC*, No. C17-5138 RBL, 2018 WL 4095091 (W.D.
18 Wash. Aug. 28, 2018), the federal district court examined a letter that was similar to the
19 March 13, 2012, letter here. The letter in *Creagan* provided notice of the lender’s intent
20 to accelerate a note in the future contingent on the debtor’s failure to cure a default. The
21 court concluded that under Washington law, “[t]he [n]otice coupled with the failure to
22 cure d[id] not together add up to an acceleration as a matter of law.” *Id.* at *2. Based on

1 these authorities, the court concludes that the language in the March 13, 2012, letter at
2 issue here did not result in an acceleration of the Spesocks' Note either.

3 Third, when the Washington Legislature created the DTA, it altered the common
4 law rules governing remedies such as the acceleration of secured notes known as
5 mortgages, in exchange for a new form of security instrument—the deed of trust—that
6 eases a lender's ability to recover its security interest.¹⁰ In place of the common law
7 concept of acceleration, the DTA mandates that a borrower has the right to reinstate a
8 loan in each non-judicial foreclosure proceeding commenced by a lender. *See* RCW
9 61.24.090(1) (“At any time prior to the eleventh day before the date set by the trustee for
10 the [non-judicial foreclosure] sale . . . , or in the event the trustee continues the sale
11 pursuant to RCW 61.24.040(6), at any time prior to the eleventh day before the actual
12 sale, the borrower . . . shall be entitled to cause a discontinuance of the sale proceedings
13 by curing the default or defaults set forth in the notice.”). The amounts the borrower
14 must pay to reinstate the loan does not include “such portion of the principal as would not
15 then be due had no default occurred”—in other words, any amount due solely as a result
16 of an acceleration following default.¹¹ *See* RCW 61.24.090(1)(a).

18 ¹⁰ *See Rustad Heating & Plumbing Co. v. Waldt*, 588 P.2d 1153, 1154 (Wash. 1979) (“An
19 examination of the legislation creating the statutory deed of trust provided for in RCW 61.24
20 reveals the act created a security instrument allowing for quicker realization of the security
interest. In exchange, the remedies available in conventional mortgages allowing acceleration of
the entire debt and deficiency judgments were taken away.”).

21 ¹¹ This right to reinstatement was confirmed in the March 13, 2012, letter that Chase sent
22 to the Spesocks. (Janet Spesock Decl. ¶ 2, Ex. A at 2 (“If permitted by applicable law, you have
the right to reinstate after acceleration of the Loan”); Jeffrey Spesock Decl. ¶ 2, Ex. A at 2
(same).)

1 Based on these statutory provisions, the Trust argues, and the court agrees, that the
2 borrower's statutory right to reinstatement adheres to each non-judicial foreclosure sale
3 initiated by the lender. *See generally* RCW 61.24.090 (setting forth procedures
4 applicable to all non-judicial foreclosure sales); *see also Erickson*, 2018 WL 1792382, at
5 *3 (stating that three letters warning that a note "will be accelerated" if the borrower does
6 not cure the default did not result in acceleration because the DTA "precludes the creditor
7 from enforcing the election [to accelerate a loan] prior to the eleventh day before the date
8 of the trustee's sale," and the courts "must honor this policy choice") (alteration in
9 original)) (quoting *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 910 P.2d 1308, 1317
10 (Wash. Ct. App. 1996)). Thus, if a lender discontinues a non-judicial foreclosure
11 proceeding and then initiates another non-judicial foreclosure process, the borrower's
12 right to reinstatement adheres anew to the subsequent process under RCW 61.24.090.
13 Accordingly, an acceleration does not commence the running of the statutory period
14 when nonjudicial foreclosure proceedings are later discontinued because the parties return
15 to the status quo until such time as the lender initiates another non-judicial foreclosure
16 proceeding. *See, e.g., Tingvall v. U.S. Bank*, No. 75365-7-I, 2017 WL 2335013, at *2,
17 199 Wash. App. 1011 (Wash. Ct. App. May 30, 2017) (unpublished) (recognizing this
18 argument concerning the statute of limitation and acceleration under the DTA, but
19 deciding the issue on other grounds). Therefore, even if the Spesocks received a letter
20 prior to their October 15, 2009, bankruptcy threatening to accelerate their Note if they did
21 not cure the default, such a letter would not affect the running of the statutory period
22 here.

1 For all of the reasons stated above, the court concludes that the Spesocks are not
2 entitled to additional discovery on this issue under Rule 56(d). In addition, the court
3 concludes that the statutory period on the Deed of Trust had not run prior to the Spesocks
4 filing of the present complaint.¹² Accordingly, the court denies the Spesocks' motion for
5 summary judgment on the statute of limitations and grants the Trust's motion for
6 summary judgment on the same issue.

7 **C. Authority to Foreclose**

8 The Spesocks appear to assert in their complaint that the Trust did not receive a
9 lawful assignment of an interest in the Note or Deed of Trust. (*See, e.g.*, Compl. ¶ 2.4
10 ("U.S. Bank . . . did not receive proper assignment from Bank of America NA or LaSalle
11 Bank NA.")) The Trust moves for summary judgment that it is the holder of the
12 Spesocks' Note and Deed of Trust, and as such, is the proper party to conduct a
13 nonjudicial foreclosure of the Property. (Def. MSJ at 12-14.) The Spesocks did not
14 respond to this portion of the Trust's cross motion for summary judgment. (*See generally*
15 Plf. Resp.) The court now considers the Trust's motion.

16 The Note was specially endorsed by the original lender to Residential Funding
17 Corporation, which in turn executed an allonge endorsing the Note in blank. (*See*
18 Hoisington Decl. ¶ 2, Ex. A.) The Trust holds the endorsed-in-blank Note. (*See* Def.

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¹² The Trust also argues that the statute of limitations should be equitably tolled for an
additional 490 days while the servicer of the Note was engaged in processing the Spesocks'
various requests for loan modifications. (Def. MSJ at 9-11, 19.) The court does not need to
decide this issue because even if the statute of limitations is not equitably tolled it did not expire
prior to the filing of the Spesocks' complaint. *See supra* § III.B.

1 MSJ at 2 n.2 (stating that “[c]ounsel for the Trust has in her possession the original Note
2 and Deed of Trust”).) Under Washington law, an instrument endorsed in blank becomes
3 payable to the bearer and may be negotiated. RCW 62A.3-205(b). The holder of such a
4 negotiable instrument is the person in possession and is entitled to enforce it. *Zalac v.*
5 *CTX Mortg. Corp.*, No. C12-01474 MJP, 2013 WL 1990728, at *3 (W.D. Wash. May 13,
6 2013), *aff’d*, 628 F. App’x 522 (9th Cir. 2016) (citing RCW 62A.3-301). Here, the
7 Spesocks do not dispute that the Trust is in physical possession of the Note and that it is
8 endorsed in blank. (*See generally* Plf. Resp.) Therefore, the Trust is the holder of the
9 Note as a matter of law.

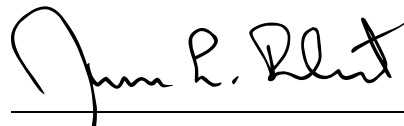
10 When the Note was transferred to the Trust, the Spesocks’ Deed of Trust was
11 transferred with it by operation of law. Under Washington law, a deed of trust follows
12 the transfer of debt. *See e.g., Am. Sav. Bank & Trust Co. v. Helgesen*, 116 P. 837, 840
13 (Wash. 1911), *on reh’g*, 122 P. 26 (Wash. 1912) (“There is no doubt that a mortgage, or
14 any other security given for the payment of a bill or note, passes by a transfer of the bill
15 or note to the transferee.”). In *Bain v. Metropolitan Mortgage Group, Inc.*, the
16 Washington Supreme Court expressly provided that this maxim extends to the DTA. 285
17 P.3d 34, 44 (Wash. 2012) (“Washington’s [DTA] contemplates the security instrument
18 will follow the note, not the other way around.”) Because the Trust is the holder of the
19 Spesocks’ Note, the Trust is also the holder of the Deed the Trust as a matter of law and,
20 therefore, entitled to enforce it. Thus, “it follows logically that the noteholder is entitled
21 to enforce both the note and the [deed of trust] by operation of law.” *Beck v. U.S. Bank*
22 *Nat’l Ass’n*, No. C17-0882JLR, 2017 WL 6389330, at *4 (W.D. Wash. Dec. 14, 2017)

1 (citing *Bavand v. OneWest Bank*, 385 P.3d 233, 248-49 (Wash. Ct. App. 2016), *as*
2 *modified* (Dec. 15, 2016) (“[The bank’s] authority to enforce the note and [DOT] arose
3 by operation of law due to the bank’s status as holder of the delinquent note.”)).
4 Accordingly, the court also grants the Trust’s motion for summary judgment that it has
5 the authority to conduct a non-judicial foreclosure proceeding against the Property based
6 on the Deed of Trust.

7 **IV. CONCLUSION**

8 Based on the foregoing analysis, the court DENIES the Spesocks’ motion for
9 summary judgment (Dkt. # 18), GRANTS the Trust’s motion for summary judgment
10 (Dkt. # 21), and DISMISSES this action with prejudice.

11 Dated this 26th day of September, 2018.

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14 JAMES L. ROBART
15 United States District Judge
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